

Investment, Governance and Engagement Sub Committee

Item 3 – Paper B Supreme Court Judgement

Palestine Solidarity Campaign and another v Secretary of State (MHCLG)

The judgement for the above case (heard on the 29 November 2019) was handed down on the 20th April 2020. A copy of the full judgement can be found at <https://www.supremecourt.uk/cases/docs/uksc-2018-0133-judgment.pdf>

The case was heard by Lady Hale (since retired), Lord Wilson, Lord Carnwath, Lady Arden and Lord Sales.

Issue

Whether by including a requirement in statutory guidance that LGPS administering authorities should not pursue policies that are contrary to UK foreign policy or UK defence industry, the Secretary of State had exceeded his powers under the Public Service Pensions Act 2013, Local Government Pension Scheme Regulations 2013 and Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016.

Background

The case had initially been heard in the High Court on the 22 June 2017 that found in favour of the appellants but this decision was reversed by the Court of Appeal on the 6th June 2018 on the grounds that the Secretary of State had acted within his powers and for a pensions purpose. This was appealed by the Palestine Solidarity Campaign Ltd and a second appellant, Ms Jaqueline Lewis, to the Supreme Court.

Decision

On a majority decision (by Lady Hale, Lord Wilson and Lord Carnwath) the court found in favour of the appellants. It is important to note that there was no dissent from the view that the Secretary had the power to publish statutory guidance to direct ways in which administering authorities should exercise their investment function. The Supreme Court concluded that the Secretary of State has the power to direct administering authorities how they should invest, but not what they should invest in.

SAB Statement and Summary Note

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In response to the judgement SAB published the following short statement on the 11th May 2020 :-

'The SAB welcomes the clarity brought by the judgement of the Supreme Court in the case of R (on the application of Palestine Solidarity Campaign Ltd and another) Appellants) v Secretary of State for Housing, Communities and Local Government (Respondent). In seeking to restrict the outcome as well as the considerations taken account of by an LGPS administering authority when developing its responsible investment policy, the government has been judged to have overstepped its powers. It is the Board's view that Responsible Investment policy decisions belong at the local level reflecting: the need to pay pensions both now and in the future; local democratic accountability and the views of scheme members; and that outcomes of policy developments should not be subject to restrictions based on unrelated matters'

SAB also agreed that in conjunction with its legal adviser a summary of the judgement should be prepared. The summary document was published on the 8th June 2020 at http://lgpsboard.org/images/Guidance/SAB_SCSN062020.pdf

Response to correspondence

In response to a number of enquiries from administering authorities seeking guidance on how to respond to correspondence from special interest groups and the media SAB agreed that the following standard wording should be adopted :-

"Thank you for your email. We are aware of approaches to many LGPS administering authorities following the recent Supreme Court case on boycotts and disinvestment. This approach does appear to be based on a template letter.

The SAB have now published a summary of the case which highlights that the judgement was narrow in its impact and places no new duties or obligations on LGPS fund authorities beyond those currently in investment guidance, in particular:

You may take into account non-financial factors when making investment decisions where;

- (i) this would not involve significant risk of financial detriment to the scheme and
- (ii) where the administering authority has good reason to think that scheme members would support its decision.

The judgement would appear to confirm that it is entirely the decision of the administering authority what, if any action is taken in respect of non-financial factors even if the two criteria above are met.

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It of course remains the case that financial factors, which could include regulatory or other risks to returns can and should be considered when making investment decisions. However it is for the authority, taking proper advice, to determine the nature and extent of any such risks as part of their investment strategy.”

Recommendation – that the Committee notes this summary and tasks the Secretariat to keep it informed of developments